IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re ENRON CORPORATION SECURITIES LITIGATION	§	
THIS DOCUMENT RELATES TO:	§	
All Cases	§	
MARK NEWBY, ET AL.,	§	
Plaintiffs,	§	
v.	§	**CIVIL ACTION NO: H-01-3624 (Consolidated)**
ENRON CORPORATION, ET AL.,	§	
Defendants.	§	

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO COMPEL ANSWERS TO INTERROGATORIES

Defendants Mark A. Frevert, Steven J. Kean, Rebecca Mark-Jusbasche, and Lou L. Pai ("Defendants") file this reply to Lead Plaintiff's opposition to Defendants' motion to compel Lead Plaintiff to answer interrogatories, and respectfully show the Court as follows:

INTRODUCTION

Lead Plaintiff's opposition presents three arguments against revealing the identity of persons specifically quoted or referred to in the live Complaint: First, that these identities are protected attorney "work product;" second, that some "few" (not "many" or "all") of the persons fear retaliation and are therefore protected by an "informer's privilege;" third, that the interrogatories are premature.

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Lead Plaintiff's position is incredible. Lead Plaintiff chose to include in the Complaint alleged specific quotations from and references to anonymous witnesses, and used such allegations to oppose various defendants' motions to dismiss. Now that the case is in its discovery phase, Lead Plaintiff is attempting to obstruct discovery into basic facts underlying the 649-page Complaint: the identities of the persons specifically quoted or referenced to. Rather than reveal the very elemental factual information of who said or did the matters alleged in the Complaint, Lead Plaintiff proposes to instead provide a list of 131 alleged witnesses (which is still not all of the alleged witnesses), without saying which witness provided which alleged quote or provided information supporting which allegation. Plaintiff instead suggests that Defendants notice each of those witnesses for deposition and spend countless hours taking each one through the entire 649-page complaint and ask them whether they provided each quote or provided information supporting each allegation. This scavenger hunt approach would be wasteful and silly in even a normal case. In this case, where discovery is on an extremely tight schedule and deposition time is rationed to the minute, it is completely unworkable. Lead Plaintiff's justification for such staggering inefficiency is its claim that a fact witness making a specific statement about matters alleged in the Complaint, or having done something specifically alleged in the Complaint, is "attorney work product." As will be shown below, the work product doctrine has *never* extended to the identity of witnesses or other underlying facts, nor should it.

For "some few" witnesses, Lead Plaintiff not only refuses to identify the statements made by the witness, but also refuses to disclose the witness's name at all. In those instances, Defendants cannot even attempt the wasteful deposition scavenger hunt that Lead Plaintiff advocates. Plaintiff's purported basis for refusing to disclose these names is that these few witnesses fear retaliation. Plaintiff admits that these witnesses fear no retaliation from Defendants (who, as mostly unemployed

former officers of a now-defunct corporation are in no position to retaliate against anyone even if they wanted to), but from the witness's own employers. Plaintiff offers no proof of any such threatened retaliation, but if Lead Plaintiff has a legitimate concern respecting some of these witnesses, then Defendants can designate the interrogatory answers "confidential" under this Court's protective order and they will not be disclosed to the witness's current employer. In no event does this unsupported threat of retaliation from some third-party provide a reason for Lead Plaintiff to avoid disclosing the identities of these fact witnesses to Defendants.

If plaintiffs are to be allowed to purport to quote witnesses in their complaints (and use those quotes and references to the witness to oppose a motion to dismiss), but never reveal who they are purporting to quote or rely upon, the pleading standards in securities cases will be rendered meaningless. The one thing that ensures that plaintiffs will be careful with their quotations and citations is the knowledge that they will someday need to prove them. If defendants cannot discover the names of the alleged speakers, defendants will never be able to test the veracity or accuracy of plaintiff's quotations and the Court will never be able to learn whether the witness actually said what plaintiff claims or, in fact, whether the supposed anonymous speaker even exists.

ARGUMENT

I. The identity of persons quoted or referred to in the Complaint is not "work product."

As this Court is undoubtedly already aware, the identities of witnesses is routinely disclosed. Defendants' right to depose witnesses would be a farce, if Lead Plaintiff is allowed to conceal from them the identities of the people that should be deposed. Defendants ask only that Lead Plaintiff provide the identity of the witnesses that Lead Plaintiff has already quoted or relied upon for an allegation in Lead Plaintiff's complaint. Defendants have not asked for Lead Plaintiff's notes or that

Plaintiff disclose anything the witness might have said that Lead Plaintiff has not already disclosed in its Complaint.

Recognizing that the formal work product exemption of Rule 26(b)(3) granted to tangible party work product does not protect the identities at issue, Lead Plaintiff instead argues for a "work product" objection based on *Hickman v. Taylor*, 329 U.S. 495 (1947). *Hickman* addressed a plaintiff's attempts, through a variety of discovery methods, to obtain from the defendant's lawyer complete, verbatim statements (both oral and written) taken by the lawyer from fact witnesses. *See id.* at 498-500. *Hickman* recognized the policy interest that an attorney be able to "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories, and plan his strategy without undue and needless interference." *Id.* at 511. This policy interest helps define "the arena of discovery" because "[n]ot even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney." *Id.* at 510. With respect to the written witness statements, *Hickman* established the rule – later codified in 1970 as Rule 26(b)(3) for all tangible work product – that the burden rested on the discovering party to show good cause for such discovery. *See id.* at 512. With respect to the oral witness statements, *Hickman* held that the "grave dangers of inaccuracy and untrustworthiness" inherent in a lawyer's recollection or summary, and the undesirability of turning every lawyer into a witness, undermined any possible usefulness of such statements for impeachment or corroboration of a fact witness and disallowed the discovery. *See id.* at 512-13.

As the rules of discovery have evolved in the 57 years since *Hickman*, the scope of discovery has expanded into many areas requiring some incidental revelation of attorney opinion or theory. Even to make initial disclosures under Rule 26(a)(1), for instance, requires an attorney to determine which witnesses and documents in particular may be used to support his or her client's claims or

defenses. Rule 26(a)(1)(C) requires disclosure of a party's computation of damages. And Rule 33(c) expressly allows interrogatories concerning opinions and contentions, including the application of law to fact. The policy interest set forth in *Hickman* survives, outside of Rule 26(b)(3), as a limit to the scope of discovery even for intangible information, not as a block to the revelation of information clearly within the scope of discovery.

The "work product" concept does not protect the identities of the persons specifically quoted or referred to in the Complaint. As noted in FEDERAL PRACTICE & PROCEDURE:

> Before 1970, the courts consistently held that the work product concept furnished no shield against discovery, by interrogatories or by deposition, of the facts that the adverse party's lawyer has learned, *or the persons from whom he or she had learned such facts*, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery.

Wright & Miller, 8 FED. PRAC. & PROC. CIV.2D § 2023 (emphasis added). (The adoption of Rule 26(b)(3) in 1970 did not change this rule. *See id.*) For instance, in the opinion *B & S Drilling Co. v. Halliburton Oil Well Cementing Co.*, 24 F.R.D. 1, 4-5 (S.D. Tex. 1959), a court in the Houston Division expressly rejected the contention that "work product" was a valid objection to an interrogatory asking whether plaintiff contended that an employee of defendant had offered to pay any witness and, if so, "the names, addresses, and locations of the witnesses from whom plaintiff obtained such information."

More recently, many other district courts have held that a party may be compelled to identify fact witnesses with respect to specific allegations. In *Miller v. Ventro Corp.*, 2004 WL 868202, Cause No. C01-01287 SBA (EDL), at *1-2 (N.D. Cal. Apr. 21, 2004), the court compelled the plaintiffs to identify 22 "Confidential Witnesses" specifically referred to in the complaint. The court rejected plaintiff's "work product argument," observing that "[b]ecause Plaintiffs chose to build their complaint on a foundation of statements from the twenty-two CWs, the identities of those

individuals are highly relevant and reasonably calculated to lead to the discovery of admissible evidence." *Id.* at *2. "This list would not reveal counsel's mental impressions or processes and therefore is not protected by the work product doctrine." *Id.* Similarly, in *SR Int'l Business Ins. Co. v. World Trade Center Properties LLC*, 2002 WL 1334821, No. 01 Civ. 9291 (JSM), at *5 (S.D.N.Y. June 19, 2002), the court allowed witnesses to be questioned about conversations between a party's attorneys and certain third-party fact witnesses in preparation for the witnesses' depositions. The court held that the "work product doctrine" did not preclude questioning of the witnesses concerning what they said to the lawyers. *Id.* at *6. The court in *In re Theragenics Corp. Securities Litig.*, 205 F.R.D. 631, 634-36 (N.D. Ga. 2002), observed that "names and addresses of witnesses interviewed by counsel who have knowledge of the facts alleged in the complaint are not protected from disclosure by the work product doctrine" and compelled plaintiffs to answer interrogatories seeking the identity of "all former employees of Indigo . . . with whom you or your representatives communicated, as alleged in the preamble paragraph of the Second Amended Complaint . . ." and of "the 'senior supplier management employee' at Indigo who provided information concerning what was 'common knowledge' at Indigo as alleged in paragraph 25 of the Second Amended Complaint." Another court, also overruling a "work product" objection, compelled answers to similar interrogatories in *In re Aetna Inc. Securities Litig.*, 1999 WL 354527, No. Civ. A. MDL 1219, at *1-4 (E.D. Pa. May 26, 1999), where the interrogatories sought the identities of persons specifically described in plaintiffs' complaint and of supporting witnesses who were the basis for allegations in specific paragraphs of the complaint. The *Aetna* court specifically rejected plaintiffs' attempt to rely on reference to a general list of "persons with knowledge." *See id.* at 1. And the court in *American Floral Services, Inc. v. Florists' Transworld Delivery Assoc.*, 107 F.R.D. 258, 261 (N.D. Ill. 1985),

granted a motion to compel to require the plaintiff to identify specifically which two witnesses from a list of 200 had provided information concerning a specific issue. The court observed:

> [The defendant's] ability to distill the 200-person list, as tendered by [the plaintiff], into the two names of persons with allegedly inculpatory information smacks of a needle-in-haystack search: time-consuming, wasteful and expensive. And that process should not be forced on [the defendant] just because the alternative of disclosure makes [the defendant's] job easier at [plaintiff's] expense. After all *every* disclosure in the course of discovery does just that to some extent–that is the necessary result of the policy judgment, made by the Rules' draftsmen, that the "fox hunt" theory of litigation was no longer acceptable.

Id. at 260-61 (citations omitted). The court rejected the idea that such information was "work product," noting that the defendant "already knows the nature of [the plaintiff's] claim, and the mere identification of persons who know facts bearing on that claim tells [the defendant] nothing new about the mental processes of [the plaintiff's] lawyers." *Id.* at 261.

The foregoing cases are based on the commonsense ideas that the identities of fact witnesses and what they said or did relevant to a lawsuit are *facts*, not attorney work product, and that obscuring discovery of such identities – such as by turning interrogatory answers into a multiple-choice guessing game – would be needlessly wasteful.

The cases cited by Lead Plaintiff are contrary to the greater weight of decision and are poorly reasoned. For example, the court in *In re MTI Technology Corp. Securities Litig. II,* 2002 WL 32344347, Civ. No. SACV 00-0745 DOC, at *1 (C.D. Cal. June 13, 2002), observed that plaintiffs' reference to anonymous sources in the complaint "adds details and credibility regarding the more general allegations of Defendants' misconduct," and in the next breath held that a "work product" privilege blocked discovery by the defendant to discover the identities of those same sources. The *MTI* court did not explain what "credibility" anonymous sources can possibly lend to a pleading if the quality of the source and the accuracy of the allegation can never be tested. Nor did the *MTI*

court address the deleterious effect its decision would have on the PSLRA's strict pleadings requirements. If the *MTI* rule is followed, lawyers will easily overcome strict pleadings requirements through liberal use of "anonymous sources," confident that a "work product" objection will block any effort to probe whether, *inter alia*, an "anonymous source" is even in a position to know the information attributed to him or her, whether the information is based on rumor or hearsay, etc.

The *MTI* court also felt that identification of the individuals linked to specific contentions "would necessarily reveal counsel's opinions regarding the relative importance of these witnesses, the highlights of their testimony/factual knowledge, and would link any future factual statements by the witnesses with Plaintiffs' counsel's legal theories and conclusions as outlined in the complaint." *See id.* at *4. This argument overlooks the obvious point that Lead Plaintiff's counsel has *already* revealed, to some extent, his opinions and conclusions by choosing to include these allegations in the complaint. *See Theragenics*, 205 F.R.D. at 636 ("Moreover, Plaintiffs have already revealed through their allegations what information was provided by the witnesses whose identity Defendants seek in this motion."). Lawyers cannot have their cake and eat it too, highlighting relevant testimony verbatim in the complaint (and even using it, as in this case, to oppose motions to dismiss), then claiming confidentiality over the same testimony when asked in discovery for its source.[1]

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[1]The other cases cited by Lead Plaintiff are similarly unpersuasive. *In re Ashworth, Inc. Securities Litig.*, 213 F.R.D. 385, 389 (S.D. Cal. 2002), involved interrogatories intended to discover the names of witnesses who had provided facts supporting the complaint. The witnesses were "for the most part, former or current employees of defendant." *Id.* at 389. (In the case at bar, none of the witnesses were employed by the Defendants, who are all individuals.) The *Ashworth* court was concerned that although the interrogatories did not specifically request a list of persons interviewed by plaintiff's counsel, "there is a reasonable possibility that such information could be ferreted out," and following the reasoning of *MTI* sustained the plaintiffs' "work product" objection. *Id.* at 388. *Ashworth* well illustrates the flaw in *MTI's* logic: its broad misreading of the "work product" concept morphs from a limited doctrine cabining the scope of discovery into a broad privilege blocking discovery of relevant facts merely because some aspect of attorney work product might thereby be "ferreted out."

The *Kerns* one-page minute order of a magistrate judge attached as Exhibit A to Lead Plaintiff's Opposition presents no analysis at all and doesn't even reveal the substance of the interrogatories in question. And the *Stanley* opinion (Exhibit B to the Opposition) contains no analysis of work product; instead, it concerns the interpretation of the PSLRA's requirements concerning disclosure of sources for allegations made on "information and belief."

By treating "work product" as a shield that can conceal otherwise discoverable facts, the *MTI* court would transform the policy interest set forth in *Hickman* into an unworkable and unwise rule. The court's rationale does not distinguish between interrogatories and depositions. May a lawyer object to a deposition question inquiring of a fact witness whether he has met with the adversary's lawyer or what they talked about? If an attorney can throw up an impenetrable "work product" screen around any witness interview, how do the parties guard against the risk of attorneys using private interviews to influence, innocently or otherwise, a fact witness's testimony through selective disclosure to the witness of facts or theories? Or what if the witness is cooperative with both sides, and volunteers to one side what the other's lawyer talked about? Is there a risk of disqualification? Is the "privilege" waived? If not, what interest is still being protected? *MTI* suggests no answer to these questions, which would certainly become hot topics for litigation in this district if the *MTI* rule is followed.

One line of cases cited by Lead Plaintiff concerns a fundamentally different issue, that in front of Judge Davis of the Eastern District of Texas in the *Electronic Data Systems Corp. v. Steingraber*, Case No. 4:02 CV 225 (Order dated July 9, 2003, attached as Exhibit A). The interrogatory in *Steingraber* was "to identify individuals *who have been interviewed* concerning the relevant allegations in the case." *Id.* at p. 2 (emphasis added). Such an interrogatory is directly targeted to reveal attorney work product: it seeks to discover not the underlying facts but instead an attorney's work and preparation. Some of the people interviewed by an attorney may turn out not even to be fact witnesses. Accordingly, such interrogatories are generally outside the scope of permissible discovery, consistent with *Hickman*. *See also Commonwealth v. First Nat'l Supermarkets, Inc.*, 112 F.R.D. 149, 150 (D. Mass. 1986) (rejecting a motion to compel an answer to an interrogatory seeking the identity of, *inter alia*, "each person who was interviewed"). The same

interrogatory, changed merely to inquire about the identities of persons with knowledge of the relevant allegations, would be unobjectionable, even though the source of the answering party's knowledge was attorney interviews.[2]

II. No "informer's privilege" applies to this civil case among private litigants.

Lead Plaintiff also attempts to block identification of the persons quoted or referred to specifically in the Complaint by characterizing the persons as "confidential whistleblowers" and "informants." But Lead Plaintiff's own declaration demonstrates that these people are not "confidential whistleblowers" or "confidential informants." With commendable candor, Lead Plaintiff admits that when they interviewed the witnesses at issue, Lead Plaintiff's counsel "made no guarantees that identities of those we interviewed would be protected from disclosure in the discovery process." (Howes Decl. ¶2)[3]. Accordingly, the witnesses had no expectation of privacy when they provided their quotes and other information to Plaintiff's counsel.

As Lead Plaintiff's counsel admits, "most interviewees re-contacted in recent weeks affirmed their participation going forward in the litigation even when told that their identities would be disclosed now in response to interrogatories." (Howes Decl. ¶2). Yet Plaintiff refuses to identify which of those interviewees provided which quotations in the complaint. Even with those "few witnesses" who expressed some reluctance, Lead Plaintiff's counsel only assured them that he would "do everything in [his] power to never *publicly* reveal their identities and their particular employment

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[2]The *MTI* court appears to improperly extrapolate from the rule generally restricting discovery of the list of all witnesses interviewed by an attorney to conclude that by interviewing a witness an attorney thereby transforms that witness's position and knowledge of relevant facts into protected "work product." *See MTI*, 2002 WL 32344347, at *3.

[3]To support the allegation of threatened retaliation, Lead Plaintiff offers the Declaration of G. Paul Howes. Defendants object to the Declaration because it is replete with hearsay. FED. R. EVID. 802. Mr. Howes does not purport to say that he has personal knowledge of any threatened retaliation, only that he has talked with some witnesses who told him they "fear" retaliation if their identities are disclosed. In addition to being inadmissible hearsay, such statements are so indefinite and conclusory they do not come close to establishing any real threat of retaliation.

circumstances." (Howes Decl. ¶2 and 3 (emphasis supplied)).[4] But Plaintiff can avoid *public* disclosure by simply designating its interrogatory responses "confidential" under this Court's protective order.

Even if Lead Plaintiff's counsel had promised the witnesses that their names would not be revealed to even the parties in this case, that alone would not be sufficient to prevent disclosure. Plaintiff cannot unilaterally render relevant information undiscoverable by the simple act of promising a nonparty that Plaintiff will not disclose it. Plaintiff certainly cannot render such information non-discoverable and then use that information in crafting Plaintiff's complaint. Lead Plaintiff has failed, by argument or evidence, to establish any such protected privacy right precluding the identification of fact witnesses.

Some cases cited by Lead Plaintiff, including the prior order of this Court, concern the pleading requirements of the PSLRA, *not* the scope of discovery. *See ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336 (5th Cir. 2002); *Novak v. Kasaks*, 216 F.3d 300 (2d Cir. 2000); *In re Enron Sec. Litig.*, 235 F. Supp. 2d 549, 570-71 (S.D. Tex. 2002). Surely the PSLRA, in making more strict the plaintiff's pleading requirements in a securities case, did not *narrow* the scope of discovery permitted under the Federal Rules into a plaintiff's allegations.

Other cases cited by Lead Plaintiff deal with the *real* "informer's privilege," which is available to the *government* to protect the identities of its informants. *See, e.g., McCray v. Illinois*, 386 U.S. 300 (1967) (police informants); *Roviaro v. United States*, 353 U.S. 53 (1957) (government

[4]Mr. Howes's statement that he has assured some witnesses that he "would do everything in [his] power to never publicly reveal their identities and their particular employment circumstances" raises new concerns about Lead Plaintiff's interrogatory answers. It now appears that, in addition to the list of 131 persons with knowledge identified by Lead Plaintiff in response to the interrogatories, there may be additional witnesses, not on the list, whose identities Lead Plaintiff is refusing to disclose even as persons with knowledge. Yet these are people specifically quoted or referred to in the Complaint.

informer); *Hodgson v. Charles Martin Inspectors*, 459 F.2d 303 (5th Cir. 1972) (FLSA whistleblowers to Department of Labor); *United States v. Rawlinson*, 487 F.2d 5 (9th Cir. 1973) (police informant); *Wirtz v. Continental Fin. & Loan Co.*, 326 F.2d 561 (5th Cir. 1964) (FLSA whistleblowers to Department of Labor); *Mitchell v. Roma*, 265 F.2d 633 (3d Cir. 1959) (informers to the Department of Labor); *Reich v. Midpoint Registry*, No. 92-5058, 1993 U.S. Dist. LEXIS 15246 (D.N.J. June 1, 1993) (same). The foundation of the informer's privilege is not just the generalized fear of retaliation, but also the logical disconnect between the identity of a government informer and a subsequent prosecution by the government of an alleged wrongdoer. As the court in *Wirtz* explained:

> It is perfectly plain that the names of informers are utterly irrelevant to the issues to be tried by the trial court. . . . What possible difference does it make who reported to the Secretary that violations had occurred? . . . In such circumstances the only conceivable need for the names of the informers would be the desire of the employer to know who had informed on it. This is not a relevant issue to the cause before the trial court.

Wirtz, 326 F.2d at 563. The Supreme Court has noted, "Where the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way." *Roviaro v. United States*, 353 U.S. 53, 60-61 (1957). Unquestionably the identities of the persons highlighted by Lead Plaintiff in the Complaint are "relevant and helpful" to Defendants' defense, and are "essential to a fair determination of the cause."

The only case (aside from the *MTI* line of cases) cited by Lead Plaintiff extending the "informer's privilege" to a private litigant is *Management Information Technologies, Inc. v. Alyeska Pipeline Service Co.*, 151 F.R.D. 478 (D.D.C. 1993). That case involved attempts by the defendants to discover, both formally and through numerous "self-help" subterfuges, who had told the plaintiff

of environmental wrongdoing by the defendants which the plaintiff then reported to the EPA. *Id.* at 480. The court expressed a concern for possible retaliation against the informers, who still worked for the defendant companies, especially when "the identities of the confidential informants do not go to the heart of the case and are at best marginally relevant to the issues at stake in this litigation." *Id.* at 482-83. Accordingly, as in *Wirtz*, the identities of the informers in *Alyeska* were not directly relevant to the litigation; it was their *status* as informers that was sought. In contrast to the *Alyeska* case, the identities of the persons quoted or referred to in the Complaint are highly relevant; indeed, Lead Plaintiff chose to highlight their materiality by specifically quoting or referring to them.

The *MTI* court recognized that "the whistle-blower privilege is not available in this private suit . . . ." *MTI*, 2002 WL 32344347, at *5. The court proceeded nevertheless to find "a legitimate policy concern that militates against requiring disclosure." *Id.* Accepting *arguendo* that a "policy concern" exists to protect "whistle-blowers" in general, the Lead Plaintiff has failed to establish that such a concern has any application to Defendants' interrogatories.

As with Lead Plaintiff's proposed "work product" privilege, the broad "informer's privilege" argued for by Lead Plaintiff would raise a host of practical problems. What happens when such a witness is deposed? Can a lawyer instruct the witness not to answer whether the witness has ever met with the lawyer or an investigator for the lawyer's client? Can witnesses testify without ever revealing that they have had private discussions with one side's attorneys? And who decides which witnesses are covered by this new privilege? Does the witness have to actively seek out an investigator, or is everyone who happens to be contacted by an investigator covered?

The abstractness of these questions highlights the problems with Lead Plaintiff's blanket approach. If Lead Plaintiff has a legitimate concern about retaliation against a specific witness, the proper procedure is to prove good cause and obtain a protective order. *Cf. Miller*, 2004 WL 868202,

at *3 (declining to enter a protective order where plaintiffs conceded there was no specific evidence of a likelihood of retaliation); *In re Aetna*, 1999 WL 354527, at *5 (denying a protective order where "Plaintiffs have failed to make a specific showing that Aetna has attempted to intimidate individuals connected with this case or has a history of such intimidation in other cases"). Defendants will agree not to disclose Lead Plaintiff's interrogatory answers to the employer of any confidential witness who fears retaliation or to otherwise work with Lead Plaintiff to ensure that such matters are treated appropriately under the Protective Order in place.

III. The interrogatories are not "premature"

Lead Plaintiff's argument that the interrogatories are "premature" is hard to understand, given that Lead Plaintiff certainly already possesses the information needed to make a complete response. Lead Plaintiff chose to specifically quote or refer to witnesses in its Complaint; presumably it knows who it was quoting or referring to. What additional discovery does Lead Plaintiff need in order to know who it was quoting or referring to in its own Complaint? Moreover, who said what is not a "contention," it is a fact. To defer answering these interrogatories until *after* discovery, as Lead Plaintiff suggests, would wholly undermine the utility of the interrogatories in the first place, which is to narrow the factual issues for the deposition phase.

To the extent Lead Plaintiff's concern is really with an ongoing duty to supplement, Defendants agree to restrict the subject interrogatories to the information Lead Plaintiff had at the time the First Amended Consolidated Complaint was filed.

IV. Prayer

Lead Plaintiff's Opposition presents no valid reason to sustain Lead Plaintiff's objections to the subject interrogatories.

FOR THESE REASONS, the Defendants request that this Court order the Lead Plaintiff to answer the interrogatories specifically and in full.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 1st day of July, 2004, he served a true and correct copy of the foregoing document on all counsel of record by posting said document in .pdf format to the http://www.esl3624.com website.

Paul D. Flack